

1 MICHAEL J. SHEPARD (SBN 91281)
2 *mshepard@kslaw.com*
3 KING & SPALDING LLP
4 50 California Street, Suite 3300
San Francisco, CA 94111
Telephone: +1 415 318 1200

5 KERRIE C. DENT (Admitted *pro hac vice*)
6 *kdent@kslaw.com*
7 1700 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20006-4707
Telephone: +1 202 626 2394

8 CINDY A. DIAMOND (SBN 124995)
9 *cindy@cadiamond.com*
10 58 West Portal Ave #350
San Francisco, CA 94127
11 408.981.6307

12 Attorneys for Defendant
13 ROWLAND MARCUS ANDRADE

14 IN THE UNITED STATES DISTRICT COURT
15 IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 THE UNITED STATES OF AMERICA,
18 Plaintiff,
19 vs.
20 ROWLAND MARCUS ANDRADE,
21 Defendant.

Case No. 3:20-cr-00249-RS

**DEFENDANT'S MOTION FOR ORDER
REGARDING DEFENSE WITNESS LIST
AND EXHIBITS DISCLOSURES**

No. 3:20-cr-00249-RS

Judge: Hon. Richard Seeborg

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24 This brief is submitted, pursuant to this Court's Stipulated Scheduling Order of
25 December 20, 2024, in support of Mr. Andrade's request that the due date for his witness
26 disclosure be the start of jury voir dire, and that the due date for his exhibit disclosure be the
27 close of the government's case.

1 In the Ninth Circuit, district courts do not have the authority to order pretrial disclosure of
2 a list of defendant's witnesses or exhibits. *United States v. Hicks*, 103 F.3d 837, 841 (9th Cir.
3 2008) (holding that district courts cannot compel pretrial disclosure of witness or exhibit lists
4 from the government or the defense), *overruled in part*, *United States v. W.R. Grace*, 526 F.3d
5 499, 509, 509 n.7, 513 (9th Cir. 2008) (en banc) (holding that district courts can compel pretrial
6 disclosure of witness lists *from the government* and declining to address whether the defense can
7 be compelled to disclose its witnesses pre-trial).

8 Several other circuits have similarly avoided ordering pretrial disclosure of witness lists
9 from the defense, *see, e.g., United States v. Cannone*, 528 F.2d 296, 299 (2d Cir. 1975) (finding
10 that district courts have the authority to order government witness lists while not commenting on
11 similar authority for defense witness lists); *United States v. Kendricks*, 623 F.2d 1165, 1168 (6th
12 Cir. 1980) (upholding order for production of a government witness list while silent on any
13 reciprocal defense production), *United States v. White*, 750 F.2d 726, 728 (8th Cir. 1984)
14 (finding court authority to order disclosure of government witnesses while silent on reciprocal
15 authority for defense disclosures), likely in light of the constitutional and other sensitivities of
16 requiring the defendant to "tip its hand as to its defense prior to trial." *United States v. Wells*,
17 No. 3:13-cr-008-RRB-JDR, 2014 U.S. Dist. LEXIS 200819, at *5 (D. Alaska, March 14, 2014)
18 (denying a government request for early witness statements from the defendant).

19 These principles are especially applicable to exhibit lists. While Mr. Andrade appreciates
20 that the Court needs to know the names of potential defense witnesses for voir dire to screen out
21 jurors who may know those witnesses, no similar reason exists for advance disclosure of exhibit
22 lists. To the contrary, there is no basis for requiring the defendant to disclose exhibits before the
23 government rests its case in chief and the defendant decides whether to present a defense. *See*
24 *generally United States v. Fratello*, 44 F.R.D. 444, 449 (S.D.N.Y. 1968) (rejecting government
25 request for order conditioning certain of its disclosures on disclosure by defendants of documents
26 that defendants intend to offer at the trial, reasoning based on the Fifth Amendment and other
27 principles that such disclosure of defense exhibits cannot be ordered prior to close of government

1 case).¹ *See generally Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (presumption of innocence
 2 assures the accused the right to “remain inactive and secure, until the prosecutor has taken up its
 3 burden and produced evidence and effected persuasion”). To hold otherwise would not only be
 4 inconsistent with *Hicks* and other authorities, but requiring disclosure of defense exhibits would
 5 effectively neutralize the defendant’s right to effective cross examination by eliminating the
 6 element of surprise that would, without advance disclosure of exhibits, exist when exhibits first
 7 appear on cross examination of government witnesses. As in many cases, the defense expects
 8 that in this case, many, if not all, of its non-expert exhibits will first appear on cross
 9 examination.

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 11
 12 Respectfully submitted,

13 DATED: January 3, 2025

KING & SPALDING LLP

14
 15 By: /s/ Michael J. Shepard

16 MICHAEL J. SHEPARD
 17 KERRIE C. DENT
 18 CINDY A. DIAMOND

19 Attorneys for Defendant
 20 ROWLAND MARCUS ANDRADE
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 27 ¹ *Cf. United States v. Davis*, 639 F.2d 239, 243 (5th Cir. 1981) (“compulsory process clause . . . forbids exclusion of
 28 otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants”)